PUBLIC PROSECUTOR

v.

ABD. RAZAK JOHARI

HIGH COURT MALAYA, KUALA LUMPUR
JAMES FOONG JC
[PERBICARAAN JENAYAH NO. 58-26-88]
27 SEPTEMBER 1990

EVIDENCE: *Criminal proceedings - Failure to tender first information report of vital prosecution witness - Presumption in section 114(a) Evidence Act 1950.*

The accused was charged with an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952. The issue for determination was whether the failure of the prosecution to tender the first information report made by PW2 was fatal to the prosecution case.

Held:

[1] Where the case against an accused depended entirely on the evidence of the complainant, the failure to produce the first information report would deprive the accused of an opportunity to cross-examine the accused - *Tan Chong Kooi v. PP and PP v. Foong Chee Cheong* followed.

[2] Failure to produce this first information report raises the presumption of s. 114(g) of the Evidence Act (the Act), that the report which could have been produced but was not, if produced would have been unfavourable to the complainant; s. 114(g) of the Act is hereby presumed against the prosecution in this case.

[Accused discharged and acquitted.]

Cases referred to:
Tan Chang Kooi & Anor. v. PP [1972] 2 MLJ 115
PP v. Foong Chee Cheong [1970] 1 MLJ 97
Teo Thin Chan & Anor v. PP [1957] 2 MLJ 184

Legislation referred to:
Dangerous Drugs Act 1952, ss. 39B(1)(a), (2)
Evidence Act 1950, s. 114illus.(g)

For the prosecution - Hafilah Bte Daud, DPP
For the accused - Anthony Femandez

JUDGMENT

James Foong JC:

The accused is charged for the following offence:

> Bahawa kamu pada 26 Mac 1988 jam lebih kurang 4.30 petang, di Jalan Raja Abdullah, di dalam Bandaraya Kuala Lumpur, di dalam Wilayah Persekutuan, telah melakukan kesalahan mengedar dadah merbahaya, iaitu ganja seberat 283.32 gram dan dengan itu kamu telah melakukan kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

The evidence for the prosecution was that on 26 March 1988 at about 4.30 p.m., one Constable Ahmad Sabri (PW2) attached to the Cawangan Anti Dadah (CAD), Kuala Lumpur arrested the accused at a bus stop along Jalan Raja Abdullah, Kuala Lumpur.

PW2 made the arrest while on his way home after work. PW2 noticed the accused acting in a suspicious manner and was in a 'kelam kabut' condition at the said bus stop.

From the bag (P5) which was carried by the accused at the material time, PW2 recovered altogether 1,000 sticks of ganja tied into 40 bundles.

PW2 arrested the accused at the said bus stand and brought him back to the Cawangan Anti Dadah office. There PW2 said he made a police report and then handed the exhibits to PW3 the investigating officer of this case.

PW3 testified that he commenced investigation relying on a police report bearing No. 4510/88.

The substances suspected of drugs recovered from the accused were sent to the chemist for analysis. It was found to contain 283.32 grammes net weight of canabis.

At the close of the prosecution case, the defence Counsel submitted that the prosecution has failed to prove a *prima facie* case against the accused for the reason that the first information report was not tendered in evidence.

After perusing the notes of evidence and the authorities submitted, I acquitted and discharged the accused without calling for his defence.

I find that the prosecution case relied solely on one vital witness PW2. PW2 was the only person at the scene of the crime. Therefore virtually the whole case depended on what he said happened on that particular day. So fundamental and important is this witness that the prosectution should have tendered the first information report which was purported to be made by him.

This report made at the early stages of the arrest, when the memory of the complainant was fresh with less likelihood of fabrication would have offered the accused a chance to compare with what the complainant is now testifying in Court.

In adopting the views of Justice Chang Min Tat in *Tan Chang Kooi & Anor v. Public Prosecution* [1972] 2 MLJ 115, where the case against the accused depended entirely on the evidence of the complainant, the failure to produce the first information report would deprive the accused of an opportunity to cross-examine the complainant.

Again as expressed by Justice Gill (as he then was) in *Public Prosecutor v. Foong Chee Cheong* [1970] 1 MLJ 97 "the absence of a first information report casts a cloud of suspicion and tends to weaken the prosecution case."

Failure to produce this first information report is a very serious omission and is fatal to the prosecution since the whole of this case depended on the testimony of PW2 who implied that he did make a police report which would have been a first information report.

Again in full agreement with the decision of Smith J in *Teo Thin Chan & Anor v. Public Prosecutor* [1957] MLJ 184, failure to produce this first information report raises the presumption of s. 114(g) of the Evidence Act that the report which could have been produced and not been produced would, if produced have been unfavourable to the complainant.

Section 114(g) of the Evidence Act is hereby presumed against the prosecution in this case, and in view of the facts as stated above the accused is thereby discharged and acquitted without having been called to make his defence to the charge.

Also found at [1990] 2 CLJ 1010